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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1469

HOMART DEVELOPMENT CO.,
Petitioner,

vs.

ROGER JON DIAMOND, PEOPLE'S LOBBY, INC., AND WILLIAM DUXLER,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF FOR THE AMERICAN RETAIL FEDERATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER.

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INTEREST OF THE AMICUS CURIAE.*

The American Retail Federation (hereinafter referred to as the "Federation"), is an organization composed of seventy-eight national and state retail associations. The membership of these associations consists of a wide variety of retail businesses ranging in size from small local stores to large national chains, representative of all aspects of the retail industry. Through these associations, the Federation represents approximately eight hundred thousand retailers with close to six million employees.

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* This brief is filed with the express written consent of counsel for both Petitioner and Respondents, in accordance with Rule 42(2) of the Court.

The Federation has appeared as *amicus curiae* before this Court in various matters of concern to its members and which have affected those members significantly in a wide variety of business relationships.[1] The instant case is decidedly within that category.

The interest of the Federation in urging reversal of the decision of the court below is predicated upon the substantial and damaging impact which that decision, if allowed to survive, will have on the retail industry.

While this case involves a shopping center, that fact does not properly delineate its effect on the industry. The term "shopping center" can be applied to any number and variety of merchandising and service operations. Indeed, there is no legally acceptable definition of the phrase "shopping center."[2]

Shopping centers can be of practically any size, ranging from a collection of large national retail operations to local, neighborhood centers with but a few small independent stores.[3] In fact, relatively smaller shopping centers pre-

1. For example, the Federation has recently filed briefs *amicus curiae* in *National Labor Relations Board* v. *United Insurance Company of America,* 390 U. S. 254 (1968); *Amalgamated Food Employees Union, Local 590* v. *Logan Valley Plaza, Inc.,* 391 U. S. 308 (1968); *Sinclair Company* v. *N. L. R. B.,* 395 U. S. 575 (No. 585) (1969); *N. L. R. B.* v. *General Steel Products, Inc.,* 395 U. S. 575 (No. 573) (1969); *Sears, Roebuck & Co.* v. *Carpet Layers Local Union No. 419,* 397 U. S. 655 (1970); *Taggart* v. *Weinacker's,* 397 U. S. 223 (1970).

2. *Freeman* v. *Retail Clerks Union,* 45 LRRM 2334, 2337 (Super. Ct., 1959), *rev'd. on other grounds,* 58 Wash. 2d 426, 363 P. 2d 803 (1961).

3. Cf., e.g., the "shopping center" described in *Thomas W. Finucane Corp.* v. *State,* 52 Misc. 2d 462, 276 N. Y. S. 2d 225 (Ct. Cl., 1966) an eminent domain case, which consisted of a one-story masonry block building containing 17,463 square feet. There were three tenants in the building—a drug store, a chain grocery store and a dry cleaning establishment.

dominate the field.[4] Shopping centers can also be of virtually any shape. Thus, the only common characteristics of all shopping centers are that they:

1) offer a variety of goods and services to the public,
2) are located on tracts of land with definite established boundaries, and
3) provide parking areas for their customers.

Significantly, these are characteristics also present in, and not materially different from, other types of retail enterprises or establishments which are not generally regarded as "shopping centers".

For example, there are many single unit department stores or discount houses which offer not only their own merchandise, but also the merchandise of others through leased departments or concessions and which have parking areas open to the public. As one commentator observed, such an enterprise, while not generally considered to constitute a shopping center, "is essentially a shopping center by itself under one roof".[5] In addition, there are large single retail stores, frequently a branch of a national chain, located on their own tract of land with a substantial public parking area.[6] There are retail enterprises which, instead of being constructed on a horizontal plane, as in the case of the sprawling suburban shopping centers, are constructed on a vertical plane due to space limitations such as those existing in downtown urban areas. Similarly situ-

4. See Applebaum, *Consumption and the Geography of Retail Distribution in the United States*, Michigan State University Business Topics, Summer 1969, pp. 28-29.

5. Id., at 31.

6. See, for example, *People* v. *Goduto*, 21 Ill. 2d 605, 174 N. E. 2d 385 (1961), *cert. den.*, 368 U. S. 927, involving a Sears, Roebuck and Co. retail store. Such stores are generally described as "free standing" stores. Since these stores (as well as discount stores) are usually large operations, the goods and services offered by them will frequently substantially exceed those offered in the smaller or even medium size "shopping centers".

ated also are those multiple stores, businesses and offices located within a single building with a common entranceway, stairwell and corridors, or the multiple manufacturing or retail establishments located within industrial parks and connected only by means of a series of private roads fronting one public artery. All such enterprises, regardless of size, shape, or the terms used to describe them, are open to the community and function as "shopping centers", and may thus be subject to the same demands as those which gave rise to the instant case.

The significance of this extended discussion of the nature of "shopping centers" is twofold. First, the task of defining a "shopping center" or of distinguishing such a commercial concept from similar or related business configurations which do not constitute shopping centers is, at best, highly complex, if feasible at all. Second, the enormous variety of those operations which have or may be described as "shopping centers",—whether that variety is viewed in terms of their location, size, function or manner of construction,—is such that a single rule relating to *all* "shopping centers" without further distinctions or qualifications would necessarily constitute an inappropriate basis for adjudicating individual disputes. An illustration of these difficulties was recently presented to this Court in *Taggart* v. *Weinacker's*, 397 U. S. 233. That case involved a single retail store containing a supermarket and a small drug department, all owned and operated by the same company. For the convenience of shoppers, the owner provided a small adjacent parking lot able to accommodate only two rows of automobiles. Adjoining the parking lot were public sidewalks. This store became involved in a labor dispute, resulting in picketing by a union in the parking lot and on the private walkway leading from the lot to the store. The union did not picket on the public sidewalks, although, given the nature of the premises, they

would have been equally visible there with equal access to the store's customers. The union sought to obtain review here of its state court trespass conviction, alleging its Constitutional right to engage in First Amendment activity on the premises of the "*shopping center*". (This Court granted the petition for writ of certiorari, but subsequently declined to reach the merits, concluding that the issue had become moot and the writ had been improvidently granted. The Court did *not*, however, vacate the lower court's decision.)

If the single store involved in *Taggart* may be said to constitute a "shopping center", a description which was applied to it even in this Court's decision, then the entire concept becomes meaningless; the mere fact of providing parking facilities for shoppers, however limited in size, would create a "shopping center". It is for this reason that the Federation believes that the ultimate disposition of the issue posed in this case should not be limited or addressed, without qualification, to a monolith denominated "shopping center". Our own proposed formulation of what he believe to constitute an appropriate rule of law (Part C, *infra*) is not so limited.

The interest of the Federation stems from the substantial and far-reaching consequences that any decision here may have for all methods of retail operation, not merely the traditional and more easily identified "shopping centers". The Federation is concerned that this Court, in formulating principles to resolve the instant controversy, should be aware of their ramifications on all of these various retail establishments as they may be affected by entry upon their property by any number of organizations or individuals desiring to propagandize an unlimited variety of messages.

The latter point is of particular concern to the Federa-

tion's members. For, apart from the difficulty of defining what a shopping center is, there is a substantial problem to retailers in coping with the number and variety of groups which would seek access to their private property in order to exercise asserted First Amendment rights. In an age of increasingly vocal dissent and social polarization, this represents a separate issue of importance to all retailers who may, given the view of the court below, be required to permit their property to become a battleground for opposing propagandists to the detriment of their own vital interests and those of the consumers who come upon their property in order to make purchases in attractive and peaceful surroundings.

Accordingly, the Federation supports the effort of petitioner, Homart Development Co., to achieve a resolution of the series of vexing and important problems presented by this case and to obtain the reversal of the decision of the lower court which fails to resolve those problems in a manner which accords adequate recognition and protection to the legitimate interests of all retailers.

REASONS FOR GRANTING THE WRIT.

This case presents for decision an unresolved conflict between rights guaranteed in the First, Fifth, and Fourteenth Amendments of the United States Constitution. The importance of obtaining a decision herein from this Court lies not only in the need to accommodate the substance of these conflicting Constitutional guarantees, but also because the problem posed in this case will continue to arise with increasing frequency in the future.

The conflict involved here occurs when groups seek to exercise First Amendment rights on the private property of another for purposes unrelated to the uses to which that property is put,[7] while the property owner seeks to limit that absolute exercise by his own reliance on the property rights which are created by state law and which are recognized and guaranteed in the Fifth and Fourteenth Amendments.[8]

This conflict cannot be resolved by a total subjugation of one set of rights to the other; such a solution would convert the existence of a Constitutional right to a merely qualified privilege. A balance must, therefore, be struck in which the essence of both guarantees may be preserved. The Court has not as yet sought to do so, having expressly reserved that duty in its *Logan Valley* decision. The court below, faced the described Constitutional conflict, declined to effect any such balance by its refusal to place any limits on the right of persons to engage in the peaceful exercise of First

7. Unlike the problem presented here, this Court has already addressed itself to the situation where the exercise of First Amendment rights are generally consonant with the ordinary use to which the private property is put. *Amalgamated Food Employees* v. *Logan Valley Plaza, Inc.*, 391 U. S. 308.

8. *NLRB* v. *Babcock & Wilcox Co.*, 351 U. S. 105; *People* v. *Goduto, supra*, fn. 6.

Amendment rights on the property of a privately owned shopping center.[9]

A. The Decision of the Court Below: A Refusal to Give Meaningful Effect to the Rights of Property in the Face of Competing First Amendment Claims.

The Court below framed the issue before it in terms of a negative absolute:

> "May the owners of a privately owned shopping center *deny all use* of their premises to persons who desire, on those premises, to engage in First Amendment activities unrelated to the business of the center?" (Emphasis added.) (A 4)

An implication of the issue, as framed, is that even if those owners may not deny *all* such use of their premises, they might Constitutionally deny *some* use. The nature of the court's discussion of this issue reveals, however, that in its view the matter is not susceptible to compromise or accommodation, for the essence of the parties' competing Constitutional interests is seen as an absolute conflict:

> "To be balanced against the interest of plaintiffs in the exercise of their First Amendment rights at the Center is the interest of defendants in *the complete prohibition* of non-business related activities." (Emphasis added.) (A 15)

It does not follow, however, that giving effect to a property owner's fundamental interest in the use and preservation of his property necessarily requires a *total* prohibi-

9. While the court did indicate that the First Amendment activity is subject to "reasonable regulation" as to the number of persons permitted and the length of time and locations at which they may be present, this regulation goes only to the *manner* in which the activity is conducted, and not to the *absolute right* of such persons to be present at some time at some locations. In finding the existence of this absolute right, the court failed to accord due regard to the property interests thereby adversely affected.

tion on others' unconsented First Amendment use of that property. The recognition and protection of the essential emoluments of property ownership can be achieved absent such unqualified control.[10]

However, when the court below took the view that the "right of property" was synonomous with such absolute control, then, when that right conflicted with an asserted First Amendment right, the court could not seek a balancing of those opposing rights but was left only with the duty to determine which was superior. That is, in the court's view, if the interests of property owners would not permit them to assert absolute dominion over their property so as to bar *all* unrelated First Amendment activity, as in one's home, then those interests were insufficient to effect a bar of *any* such activity.[11]

Pursuant to this view, challenged here as a matter of policy and precedent, the court below had only to determine whether the defendant shopping center could "deny *all* uses" of their premises to plaintiffs in order to resolve the instant conflict, rather than to seek a meaningful balancing or accommodation of opposing rights and interests.

Accordingly, the court interprets the relevant authorities to preclude a shopping center from imposing a "*blanket and total prohibition*" on the exercise of First Amendment rights on shopping center property (A. 8). Similarly, the court characterized *Marsh* v. *Alabama,* 326 U. S. 501,

10. A proposed rule of law which is derived from and harmonizes the outstanding authorities is set forth in part C, *infra.* The proposal recognizes the need for some relinquishment of such control without depriving property owners of the basic freedom to manage their property as they deem appropriate in furtherance of their legitimate business interests.

11. The court here refers to the owners' right to prevent others from coming onto their property to engage in First Amendment activity, not to the nature of the regulation of such activity once they are there.

to hold that a member of Jehovah's Witnesses could not be "*absolutely* prohibited" from engaging in First Amendment activity there, quoting in support this Court's observation that "Ownership does not always mean *absolute* dominion" (A. 8, 9). This Court's holding in *Amalgamated Food Employees* v. *Logan Valley Plaza*, 391 U. S. 308, was said to invalidate a shopping center's "*blanket prohibition* of picketing on its premises" (A. 10).

Thus, having concluded that no shopping center may prohibit *all* First Amendment activities on its premises,—which was the issue before the lower court,—the further conclusion followed that *no* such activity may be prohibited, subject to certain regulation, in view of the superior claim of the First Amendment and the insubstantial nature of shopping centers' competing property interests.

The Federation believes that this judgment, in a case of first impression, should be reviewed by this Court. There is a substantial need for clarification of the lower court's views (1) that a compromise of rights is inappropriate here given the nature of the conflicting interests; (2) that the cited precedents of this and other courts compel the conclusion that the inability to bar any First Amendment activity follows from the inability to prohibit all, and (3) that private shopping centers must, therefore, be treated, for these purposes, as if they were public property.

B. The Legitimate Interests of Privately-Owned Shopping Centers Give Rise to Rights Distinct from Those Attaching to Public Property.

The rationale for the lower court's decision that *no* peaceful First Amendment activities may be prohibited (as opposed to "regulated") on the premises of a privately-owned shopping center consists in the court's conclusion that such shopping centers are legally equivalent to public

streets, parks and "similar public places traditionally associated with the exercise of First Amendment rights" (A. 8). The court supports this conclusion by noting that "the public" is invited to these shopping centers which are said to function analogously to the "traditional town square" or "town center". By viewing the case in that light, the court below not only withheld from privately owned centers the enjoyment of those rights normally associated with private ownership, but went so far as to impose upon those owners the same duties with respect to the use of their private property as is borne by the State with respect to public property.

That result is a product of a series of dubious premises of such far-reaching impact as to compel this Court's attention.

Initially, a rule which describes "shopping centers" as analogous to "traditional" town squares or to town centers is guilty of over-reaching. No historical practice has or could be shown to support such an analogy. Indeed, the enormous diversity in size, shape and location of "shopping centers", noted *supra,* precludes referring to them or treating them as if they were all totally alike for any purpose. The social role of a huge shopping complex in a small town otherwise lacking a "town square" is entirely different, for example, from a complex of two or three small stores in the heart of a large city; yet both are "shopping centers" and, in the view of the court below, both become "public" "town centers".

Nor should the fact that shopping centers invite members of the public onto their premises convert those premises into the equivalent of public property. That invitation is not extended to all members of the public for all purposes. It is extended to consumers desiring to transact business with, and avail themselves of the services of, the enter-

prises assembled there. No such invitation is extended to those members of the "public" who would use the centers' premises for purposes of their own which were unintended by the owners, were unrelated to the owners' reason for creating the center, and which would actually or potentially interfere, to some extent, with the business object for which it was built. While this Court recognized, in *Marsh* v. *Alabama, supra,* that an owner who invites members of the public onto his property assumes the duty to honor the statutory and Constitutional rights of those whom he invites, that decision did not extend such a duty to all other persons for all purposes. Nor did that decision, or any other decision of this Court, hold that all private property to which members of the public are invited thereby lose their private character, becoming the functional equivalent of public streets or parks.

In holding that "shopping centers" may not prohibit any First Amendment activities which may not "absolutely" be barred on the public streets, the court below imposed upon the private owners of such centers the duty to permit and tolerate on their premises the expression of any views by any groups on any subjects which were not themselves unlawful or likely to result in personal or property damage. The effect of this duty is demonstrably great and, potentially, seriously adverse to the interests of the property owners.

> Even the court below understood this duty to apply
>
> ". . . without discrimination to *all* varieties of charitable, religious, paternal, social and political groups that seek to use the Center's property for *any* forms of solicitation or discussion." (Emphasis added.) (A. 5)

The combination of the enormous numbers of groups and causes described in this quoted language, together with the fact that the contemporary social climate gives rise to

ever-increasing forms and bases for protest and dissent, suggests the burden which the decision of the court below would place upon private shopping centers.

In holding that all such centers—whether large or small, urban or suburban, in cosmopolitan or parochial neighborhoods, isolated or in dense and competitive areas,—must function for First Amendment purposes as if they were public parks or streets, the court below concludes that those centers have no meaningful property interest in a *reasonable limitation* (as contrasted with a total prohibition or mere regulation) of strangers' right to engage in unrelated First Amendment activities on their premises. The Federation challenges that conclusion and believes it to be an issue of sufficient significance, philosophically and practically, to warrant this Court's attention.

In practical terms, it seems fair to assume that those who come to do business at a shopping center do not have unlimited time or patience; mothers of young children, for example, are limited by the periods the children are in school and by the time requirements of other chores. To the extent these consumers' time and attention are occupied by matters unrelated to the purpose of the center, or to the extent they choose to go elsewhere in order to avoid a possible confrontation of controversial or conflicting ideological positions, the center suffers some jeopardy. While it is true that the court below would prohibit such unrelated First Amendment activity as would result in "destruction of or *undue* interference with normal business operations" (A. 20), this concession to the property interests of the centers' owners does not reach the principal jeopardy which would result from the adoption of the lower court's holding. For that jeopardy does not consist primarily in the relatively fewer instances in which First Amendment activity would totally or virtually obstruct

business operations but in the lesser but regular and continual interference which would necessarily result from the presence on center property of every group seeking to propagandize any cause in the name of First Amendment rights.

The belief of the court below that the absolute right of such groups to some access to private center property would result in no damage to private interests and does not raise any "meaningful claim" to the protection of those jeopardized interests, appears to the Federation to be unwarranted and unrealistic. Moreover, the lower court's assertion that any threatened jeopardy may be alleviated through the regulation (as opposed to some prohibition) of the activities of the countless groups which will seek access to shopping centers is similarly unwarranted. No "regulation" will go so far as to render ineffective the regulated groups' object to inform, convert, solicit or propagandize. Therefore, whatever limit may be imposed upon the number of persons permitted to engage in these activities, or the hours and places in which they will be permitted to do so, the end result will be that sufficient persons will remain at sufficient times and at sufficient locations effectively to divert the attention of shoppers or to consume their available time or to annoy them or inflame their antagonisms or to induce them to trade in other less volatile or more peaceful surroundings. Accordingly, "regulation" may prevent total disruption of a center's business but will not eliminate lesser damage which, continued over a period of time, may be both quite substantial and, given the availability of effective alternative public forums, wholly unnecessary.

A fair balancing between private landowners' vital and legitimate property interests and the competing guarantees to others contained in the First Amendment requires a level of analysis beyond the specious conclusion that all shopping centers are like town squares, town centers, public streets

and parks and constitute public property without a need for special provision to be made for the specific private business purpose for which such centers were created.

C. A Proposal for Harmonizing the Authorities and Fairly Accommodating the Competing Constitutional Claims.

Courts' analysis of the impact of the First Amendment upon the right of private landowners reasonably to restrict the use of their premises has suffered from two infirmities. First, cases have been decided either on the basis of "rules" or "tests" which were only descriptions of results reached in particular factual contexts or on the basis of fictional assumptions which were elevated to the status of rules of law. And second, courts have tended, as did the court below, to ignore this Court's direction in *NLRB* v. *Babcock & Wilcox Co.*, 351 U. S. 105, to reach an accommodation with as little destruction of one competing right as is consistent with the maintenance of the other.

The Federation believes that a fair and reasonable analysis of the principal decided authorities concerning the instant issue, in the light of the direction of *Babcock & Wilcox*, yields a rule of law fairly balancing the competing interests without reliance on descriptive rules and legal fictions:

> Owners of private establishments catering to the public may deny the use of their premises to those who wish to use those premises for First Amendment activities unrelated to the purpose for which the public is invited *except* when no reasonably effective alternative means of communication is available.

This rule achieves a fair balance between the opposing Constitutional grants. Those wishing to exercise First Amendment rights are *guaranteed* the right effectively to do so, including, as a last resort, the *right* to use others'

private property; those who own property may limit the propaganda use to which strangers may put that property, except when no other reasonably effective means is available for the expression of legally permissible views.

In practice, courts have followed this rule irrespective of the rhetoric they have employed. Thus, in *Marsh* v. *Alabama,* the use of private property was permitted since, all the town's property being private, *no* alternative was available for the effective expression of propaganda to the town's residents. In *Logan Valley* the union's publicity, having been directed to prospective customers of a specific store, could not reasonably effectively have been made other than at the store's location at a time when those customers could receive and be influenced by the union's message. Similarly, in both *Wolin* v. *Port of New York Authority,* 392 F. 2d 83 (CA 2, 1968), and *In re Hoffman,* 64 Cal. 2d 845 (1967), the rights granted anti-war groups to picket the premises involved in those cases are consistent with the judgment that the object of the demonstrations,—*i.e.,* to reach and influence Vietnam-bound servicemen,—could be effectively achieved only at the time and place where those servicemen were assembled.

In accord with these decisions granting the right to propagandize on private property, those other courts which have refused to permit such conduct have done so in factual contexts in which there existed reasonably effective alternative means to the use of such private property. Thus, for example, in *Babcock & Wilcox Co.,* this Court emphasized both the existence of such reasonable alternatives and the consequent absence of necessity to use private property in order to achieve effective communication of the views sought to be expressed. And the application of this proposed rule to *Taggart* v. *Weinacker's, supra,* similarly justifies the state court's decision there, undisturbed by this Court, finding the union's picketing of private retail

property to constitute a trespass rather than protected First Amendment activity; for in *Taggart* the union's use of private property was unnecessary since the availability of the adjoining *public* sidewalks gave the union a wholly effective alternative locus from which to reach the very persons with whom it sought to communicate from the private parking lot.

The fact that the rule proposed here explains and harmonizes the results reached in each of these cases while striking a reasonable balance between the conflicting Constitutional guarantees involved argues strongly for its express adoption by this Court in the instant case. A secondary benefit which would be derived from doing so consists in the fact that courts would then become free to decide cases without a forced reliance on legal fiction or on essentially post hoc rules.

When this Court in *Logan Valley* described shopping centers as "functional equivalents" of municipal property, its analogy referred only to the *private municipal* property involved in *Marsh* and was, therefore, saying only that in appropriate circumstances private property could be treated as if it were public. The Court made no fixed determination as to what those circumstances would be. What is clear, as was noted before, is that this Court did *not* conclude that whenever any private property is open to the public, it automatically and totally loses its character as "private" and becomes "public" for all purposes. In sum, reference to "functional equivalence" does not constitute an analytical tool for determining when private property is subject to public First Amendment use, but merely describes the conclusion, otherwise arrived at, that under particular factual circumstances it may be so used.

Similarly, the fact that the views sought to be expressed are "generally consonant" with the use to which the private

property is put should not give rise to a rule legitimizing the public use of private property. Nor should such public use be barred, without further inquiry, because there exists no such general consonance. Let it be assumed, as a variation of the facts in *Wolin*, that servicemen bound for Vietnam were assembled as a group only in a private restaurant located in a shopping center, but that their times of departure were so staggered that *nowhere else* would they appear as a group. Would it not be reasonable to permit an anti-war demonstration directed to them to be conducted on center property near the restaurant's premises, irrespective of the fact that the uses to which the center and restaurant are put are unrelated to the purpose of the demonstration, simply because no other site and time affords an effective means of communication with those servicemen? Conversely, would it not also be reasonable to bar such demonstrations on private property, even though the use of that property is directly related to the purpose of the demonstration, when it appears that there do exist reasonably effective alternative means to achieve the same communication without invading private property?

The special emphasis which has been placed upon the "general consonance" of the First Amendment purpose and the private property's use appears to be predicated upon the assumption that where such a relationship exists, the private premises constitute the only means for effective publicity. To the extent that assumption is supported by the facts in any given case, then the public use of private property seems justified. However, instead of raising an assumption to the status of a Constitutional rule, the decision-making process should focus directly on the principle which underlies that assumption,—that First Amendment rights may impinge on property rights only when, in fact, no reasonably effective alternative means of communication are available.

Apart from achieving a fair balance of competing rights without destroying either, the proposed rule yields additional benefits. The holding of the court below allows every group or cause which would be permitted in a public park to come upon private shopping center premises, subject to reasonable regulation. Given the virtually unlimited number of such groups and causes and the potentially divisive and inflammatory effect many would have on their consumer audience, the problem of "regulation" becomes a very serious one.[12] While the proposed rule would not avoid that problem altogether, the mere fact that it would limit the number of such incursions to those instances where no reasonably effective alternatives exist would render that problem more manageable and susceptible of a more relaxed and thoughtful disposition whenever it did arise.

Nor would courts become flooded with suits seeking a determination of the validity of the multitude of varying regulations which the various "shopping centers" would otherwise continually be required to improvise.[13]

Should the rule proposed here be adopted, its application to the instant case would appear to require a reversal of the decision of the California Supreme Court. Respondents' appeal was not uniquely or solely directed at those

12. In addition to judgmental decisions seeking the least disruption of center business consistent with effective First Amendment use, "regulation" also involves maintenance and policing costs which must be borne by those whose businesses are, to some extent, being disrupted. There is also the matter of liability for injury both to consumers and to those seeking to exercise First Amendment rights, and added insurance costs, among other problems and costs related to or involved in such "regulation".

13. Assuming in the instant case, for example, that plaintiffs would be deemed entitled to make their desired use of Inland Center property, a question would arise as to whether they may be restricted to the parking lots or the entrances to the shopping area itself in order to minimize business disruption, or whether they have a right to congregate within the enclosed aisleways from which the Center's stores flow without physical barrier, as the Respondents continue to believe they may do.

consumers doing business at the shopping center. There were numerous alternative avenues available for effective communication with those persons whom Respondents desired to reach. These included all the mass media; public streets and parks; the public property adjoining every large assemblage of persons attending, for example, concerts and sporting events; and direct mailing to the homes of prospective voters, among other choices.

Therefore, to restrict Respondents to the use of these available and effective alternatives would neither deprive them of the benefits guaranteed in the First Amendment nor deprive Petitioner of the recognition and protection of his legitimate, and similarly guaranteed, property rights.

CONCLUSION.

For the reasons stated herein, the Court is respectfully urged to grant the instant Petition for Writ of Certiorari and, on consideration of the merits of the case, to adopt the proposed rule of law as a Constitutionally sound accommodation of competing rights and interests.

Respectfully submitted,

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